UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302

and

Cases 19-CA-32298
19-CA-32319
19-CA-32435

REBEKAH SILVA, an Individual

and

TIFFANY KELLY, an Individual

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 8

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT THEREOF

Pursuant to Section 102.46(d) of the National Labor Relations Board's Rules and Regulations, Peter G. Finch, Counsel for the Acting General Counsel, respectfully submits this Answering Brief to Respondent's Exceptions and Brief in Support Thereof.

I. INTRODUCTION

This consolidated case was tried before the Honorable George Carson II on October 26, 27, and 28, 2010, in Seattle, Washington. Judge Carson issued his decision (the "Decision") on January 24, 2011. International Union of Operating Engineers, Local 302 ("Respondent"), timely filed exceptions to the Decision.

Respondent excepts to fifty (50) aspects of the Decision. Generally, Respondent takes issue with Judge Carson's findings that: 1) the record evidence regarding Respondent's conduct provided ample evidence of Respondent's animus towards discriminatees Rebekah Silva ("Silva") and Tiffany Kelly ("Kelly") for engaging in Union and protected concerted activities; and 2) that Respondent failed to meet its *Wright Line* burden to prove that it would have taken the same actions against Silva and Kelly absent their protected activities. Respondent also excepts to Judge Carson's decision to reject Respondent's inappropriate unilateral, post-hearing attempts to supplement the record; and to Judge Carson's findings that Respondent's discipline of, and statements to, Silva and Kelly violated §§8(a)(1) and (3) of the Act; and that Respondent's unilateral implementation of new rules and related refusal to bargain with Office Professional Employees International Union (the "Union") regarding the effects of those new rules violated §8(a)(5) of the Act.

Judge Carson's rulings, findings, and conclusions in this matter are fully supported by the record as a whole, as well as sound bases in established law. Accordingly, Counsel for the Acting General Counsel respectfully requests that the Board overrule Respondent's exceptions and both affirm the Judge's Decision and adopt his recommended order.

II. The Record Fully Supports Judge Carson's Factual Findings, Rulings, and Conclusions that Respondent Violated §§8(a)(1), (3), and (5) of the Act

The summary of facts in the Decision is accurate and each of Judge Carson's rulings, findings, and conclusions are fully supported by the record. However, in the "Statement of the Case" section of its brief (R. Br. 1-12), Respondent makes a number of assertions regarding the

state of the record and the Decision.[1] Given that the Decision is fully supported by the record, it is unnecessary to address every one of Respondent's assertions and exceptions. However, some of Respondent's assertions in its "Statement of the Case," its factual section, require a direct response.

A. Judge Carson's Credibility Resolutions Are Correct and Fully Supported by the Record

To the extent Respondent excepts to Judge Carson's credibility resolutions, Counsel for the Acting General Counsel respectfully requests that the Board follow its established policy of allowing credibility resolutions to stand unless the clear preponderance of all the relevant evidence convinces the Board that the ALJ was incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951). A careful examination of the record does not support any of Respondent's arguments, nor does it provide any other basis, for reversing the Judge Carson's findings.[2] Indeed, Respondent's chief complaint is that Judge Carson chose not to ignore the significant record evidence presented by the Acting General Counsel establishing Respondent's unlawful conduct (particularly evidence regarding timing, inadequate internal investigation, and departure from the established progressive discipline system), in favor of adopting Respondent's own incredible proffered reasons for its discrimination and failure to meet bargaining obligations.

---

[1] Citations to relevant documents will be as follows: the Decision will be cited as D. [page number]:[line(s)]; Respondent's Brief will be cited as R. Br. [page number]; the transcript will be cited as Tr. [page]:[line(s)]; exhibits for the Acting General Counsel and Respondent will be cited GC Ex. [number] and R Ex. [number], respectively.

[2] In particular, Respondent's claims regarding Judge Carson's treatment of statements or "meaning" Respondent would attribute to its Business Manager Daren Konopaski or counsel David A. Hannah must be rejected. Neither Konopaski nor Hannah testified at the hearing; thus, there is no basis to overrule Judge Carson's credibility resolutions or the inferences he drew regarding their failure or refusal to testify.

B. Judge Carson Correctly Accorded Respondent's Purported "Evaluations" of Silva's Work Little Weight

Respondent makes much of the so-called "evaluations" that, it claims, reflect Respondent's periodic assessments of Silva's work, and excepts to the fact that Judge Carson made no mention of them in the Decision. (R. Br. 2 – 3). Judge Carson's treatment of the "evaluations" was completely appropriate, as Respondent was unable to provide any precise or meaningful evidence regarding when the documents were created, by whom they were created, when they were discussed, with whom they were discussed, or how they were used. (Tr. 542:16 – 543:21; 594:9 – 597:19). As the documents have no probative value, Judge Carson correctly accorded them no weight.

C. Judge Carson Correctly Granted the Acting General Counsel's Motion to Strike Portions of Respondent's Brief and Related Attachments

Judge Carson correctly prohibited Respondent from creating an irrebuttable narrative for its characterization of the record. Contrary to its assertions (R. Br. 9 – 10, 22), at no time during the trial did Respondent attempt to introduce any "source documents" related to "errors" Respondent would attribute to Silva.[3] In fact, Respondent deliberately avoided reliance on such "source documents," and instead introduced only a vague "summary" of alleged "errors." (R. Ex. 17; Tr. Tr. 380:8 – 383:17; 461:13 – 21). Further proof that Respondent was unwilling and unprepared to introduce any "source documents" is the fact that Respondent did not even have copies of the purported "source documents" at the hearing. (Tr. 620:23 – 621:4). After the

[3] The record does contain "source documents" that Respondent offered, without objection from Counsel for the Acting General Counsel, with regard to errors allegedly committed by other employees. (R. Ex. 15; Tr. 374:16 – 25).

hearing closed, Respondent improperly attached to its brief a previously unintroduced purported "summary" of Respondent's post-hearing review of the extra-record "source documents."[4] Significantly, since even at this point Respondent did not attempt to have the record reopened to offer the "source documents," Respondent's assertion that it was "significantly prejudiced by being foreclosed from preventing the evidence [sic] of the underlying data" is disingenuous at best. Accordingly, Judge Carson's ruling should be affirmed. *See, e.g., Ron's Trucking Service*, 236 NLRB 1065, 1070 (1978), *enfd. sub nom. NLRB v. Hackenberger*, 531 F.2d 364 (6th Cir. 1976), *cert. denied*, 429 U.S. 830 (1976) (striking affidavit, attachments, and all brief references to extra-record documents).

Even if Respondent had introduced, and Judge Carson had admitted, the "source documents," they would have been little help to Respondent. As Judge Carson correctly noted, no one with the authority to discipline Silva - not Administrative Assistant Sandy Early, not Financial, Recording, and Corresponding Secretary Malcolm Auble, nor Business Manager Daren Konopaski - reviewed the purported "source documents" before terminating Silva's employment.[5] (D. 9:47 – 10:2; Tr. 414:15 – 21, 415:8 – 416:16). Thus, as Early candidly testified, and Judge Carson explicitly noted, it mattered not whether Silva knew she had committed an error or not, nor was it necessary for any decision-maker to independently verify whether Silva had, in fact, committed any alleged "error." To the contrary, for Early (and presumably Konopaski, who did not testify), a co-worker's mere report of an "error" that somehow involved Silva was enough to justify related discipline. (D. 9:40-45; Tr. 414:15 –

[4] While the second "summary" was accompanied by a declaration attributed to Office Manager Monique Paullus, it is unclear who created and/or contributed to the creation of the "summary."
[5] Early, Auble, and Konopaski are all admitted supervisors within the meaning of §2(11) of the Act, and agents of Respondent within the meaning of §2(13) of the Act.

416:17). Respondent's self-serving arguments regarding its post-hearing review of the purported "source documents" were properly excluded from the record.

D. Respondent Has Never Expressed Any Willingness to Bargain with the Union Over its New and/or Changed Rules

Respondent asserts that Judge Carson "fails to find that Respondent agreed to bargain" with the Union. (R. Br. 6). Respondent's further suggestion that it ever expressed a "willingness to bargain" with the Union regarding the new rules is contrary to the record evidence and contradicted directly by its own arguments in support of its exceptions. (Compare R. Br. 5-6 and R. Br. 25-29). Indeed, Respondent continues to claim that it had no such bargaining obligation. (R. Br. 25 – 29).

Respondent complains that "The Decision . . . fails to find that Respondent agreed to bargain as to all but those policies for which Local 8 had previously waived bargaining, and those for which no bargaining was required by law." (Citing GC Exs. 11, 35, 37, 38). However, the record reveals that: after the January 21, 2010,[6] meeting, Union Business Representative Mary Maloy made several attempts to arrange bargaining over the policy statement, including speaking directly with Respondent's Counsel, David A. Hannah, on February 3. (Tr. 244:5-13 GC Exs. 35-39). On February 4, as Maloy awaited a response from Respondent, Early had Union-represented employees acknowledge receipt of the policy statement. (Tr. 350:8-16; GC Ex. 20). Maloy, Auble, and Hannah continued to exchange e-mails regarding the Union's demand for bargaining. (GC Exs. 35-39). By e-mail dated February 23 Hannah conveyed Respondent's final position: it would not bargain over any of the new policies or their effects.

(Tr. 247:7-251:11; GC Ex. 39). Thus, at no time did Respondent agree to bargain over the changes at issue.

E. Respondent Ignores and/or Mischaracterizes Record Evidence Regarding Its Retaliatory Discrimination of Kelly and Silva

Respondent complains that the Decision contains a "selective recitation" of certain facts (R. Br. 4), but takes significant liberties with others. For example, Respondent asserts (without citation to the record) that Kelly and Tiffany required "corrective counseling throughout their employment." (R. Br. 4). However, as the record establishes, prior to their protected activities, Silva had not been disciplined for anything more serious than occasional tardiness. (Tr. 580:10 – 581:22). Respondent also asserts that Respondent's scrutiny of Silva's work was routine. (R. Br. 7). However, it was unprecedented. No employee's work had been subject to the kind of monitoring imposed on Silva. (D. 7:16-21; Tr. 486:35 – 487:8; 487:19-488:11; GC Ex. 15, pp. 54:46 – 55:42).

Respondent further objects to Judge Carson's correct finding that the scrutiny was "pre-planned." (R. Br. 9). As Early candidly testified, when she took over supervision of the Union-represented employees, Auble told her he had been conducting a secret "investigation" of Silva's work and that Early would continue it. (Tr. 351:17 – 22; 412:6 – 24). Before March 9, Respondent did not approach Silva about any work issues, and was unresponsive, if not hostile, to Silva's concerns regarding her uneven workload. (Tr. 137:3 – 138:4; R. Ex. 12). If there were any discussions of Silva's work performance prior to March 9, they did not include Silva. (D. 9:16-29; Tr. 412:6 – 413:2). Thus, Judge Carson's finding was fully supported.

---

[6] All dates are in 2010, unless noted otherwise.

Respondent additionally claims that it was disadvantaged because the data that might support its assertions regarding Silva's employment are not in the record (R. Br. 9-10), and that Judge Carson reached adverse conclusions regarding its "business justifications" for retaliating against Kelly and Silva. (R. Br. 10-12). As noted above, Respondent alone is responsible for the lack of evidence in support of its defense; based on the record as a whole, Judge Carson correctly found that Respondent's witnesses were not credible and its asserted reasons for discriminating against Kelly and Silva were unsupported and inadequate.

III. THE DECISION IS LEGALLY WELL SUPPORTED BY PRECEDENT

A. Judge Carson Correctly Applied a *Wright Line* Analysis to the Record Evidence Regarding Respondent's Termination of Silva's Employment

Respondent acknowledges that a *Wright Line* analysis is appropriate in this case, but faults Judge Carson for failing to apply "the modern version of that analysis." (R. Br. 12). Respondent then takes issue with Judge Carson's findings and conclusions that the timing of Respondent's treatment of Kelly and Silva, Respondent's departure from its progressive discipline system, and its failure to properly investigate alleged "errors" all betray Respondent's unlawful motivations for disciplining Kelly and Silva. Judge Carson applied the correct analysis, and his conclusions that Respondent violated the Act, substantially as alleged in the Consolidated Complaint, are fully supported by the record evidence and extant Board law.

1. **Evidence Related to the Timing for Respondent's Conduct Reveals Respondent's Animus Towards Silva**

As Judge Carson correctly found, Respondent's termination of Silva's employment was not its sole reaction to her protected activities, it was merely the last in a long series of retaliatory events. (D. 5:14-11:34). Respondent's discipline of Silva closely followed her protected activities and continued through to her termination. Auble immediately suspended Silva for her role in the time sheet incident and, as soon as she returned to work from that suspension, disciplined her for stale attendance issues. In addition, the first day Silva returned to work after participating in the arbitration, Auble disciplined her for the errors allegedly disclosed by the audit he ordered while she was on medical leave. Auble also used Silva's return to work to launch the covert "investigation" of Silva's work, have her assigned additional duties, and use any error – whether Silva reported it or not – against her.

The Board frequently finds that timing supports an inference of animus and discriminatory motivation. Moreover, the inference of unlawful motivation is not negated by intervening actions by alleged discriminatees; indeed, as the Board recently pointed out, it "does not find that the timing factor necessarily favors a respondent whenever the discipline is imposed . . . immediately following the alleged infraction. An employer might wait for a pretextual opportunity to discipline an employee for engaging in protected concerted activity." *Case Farms*, 353 NLRB 257, 261 (2008), *quoting Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). *See also Toll Mfg. Co.*, 341 NLRB 832, 833 (2004) (precipitous discharge persuasive evidence of unlawful intent). Thus, while Silva's termination may have been some time after her initial protected activities, it merely punctuated Respondent's progressive retaliation against her.

See, e.g., Susan Oles, DMD, 354 NLRB No. 13, slip op. at 14 (April 30, 2009); *Case Farms*, 353 NLRB at 261.

2. Respondent Did Not Adequately Investigate Silva's "Errors" or Provide Her with Any Opportunity to Respond

Respondent relied heavily on the errors allegedly committed by Silva between December 7, 2009, and March 5, 2010, as the bases for its decision to terminate her employment. However, it is undisputed that Early did not fully investigate Paullus's report of errors attributed to Silva, nor did she either give Silva a chance to respond to the allegations against her or take into account the errors that Silva self-identified, but could not fix herself. Thus, as Early admitted, she had no idea whether the number of errors attributed to Silva, or for that matter Kihne or Paullus, were accurate.

An employer's failure to fully and fairly investigate an employee's alleged misconduct before disciplining or terminating that employee, or to provide the employee an opportunity to rebut the accusation, suggests the presence of discriminatory motivation. *Aljoma Lumber, Inc.*, 345 NLRB 261, 285 (2005); *Pratt Towers, Inc.*, 338 NLRB 61, 97 (2002); *Traction Wholesale Center,* 328 NLRB 1058, 1072 (1999).

Respondent confuses its covert "investigation" of Silva's work and compilation of real or imagined "errors" it would attribute to Silva with the thorough investigation of alleged wrongdoing required by the Board. (R. Br. 16). Had Respondent been conducting a fair, lawfully motivated "investigation" of Silva's work, it is reasonable to expect that the decision-makers would have at least attempted to verify the evidence they would use to discharge Silva,

rather than merely delegating that task to an employee. The fact that Respondent rushed to terminate Silva without adequate investigation or giving her an opportunity to respond to the allegations, alone, is sufficient evidence of Respondent's unlawful motive. *See, e.g., Alstyle Apparel*, 351 NLRB 1287, 1287-88 (2007) (limited investigation into alleged misconduct without giving employees an opportunity to explain allegations against them supports a conclusion that the discharges were discriminatorily motivated); *Midnight Rose Hotel*, 343 NLRB 1003,1005 (2004) (failure to conduct fair investigation before imposing discipline defeats claim of reasonable belief of misconduct). *See also Satellite Services*, 356 NLRB No. 17, slip op. at 9 (October 29, 2010).

3. Respondent Abandoned Its Progressive Discipline System as to Silva

Even ignoring the inadequacy of Respondent's investigation and its refusal to give Silva an opportunity to respond to its vague allegations, Judge Carson correctly cited Respondent's abandonment of its established progressive discipline system as evidence that Silva's termination was unlawfully motivated. Respondent has an established progressive discipline system that applies "across the board." (Tr. 403-3:24). Despite that established system, Respondent discharged Silva without first giving her a written warning or a one- or two-day suspension. As such, Respondent's decision to opt for the most severe penalty, particularly in the context of the many unfair labor practices described above, is further evidence that Respondent's discharge of Silva violated §§8(a)(1) and (3) of the Act. *See Toll Mfg. Co.*, 341 NLRB 832, 833 (2004) (employer's failure to follow progressive discipline system evidence of unlawful motivation); *Embassy Vacation Resorts*, 340 NLRB 846, 848-49 (2003) (animus shown by employer's deviation from its past practice of discipline and its failure to give employees a chance to defend

themselves); *Guardian Automotive Trim, Inc.*, 340 NLRB 475, 475 fn. 1 (2003) (employer failed to follow its progressive discipline policy).

Even if Respondent could have shown show that its decision to terminate Silva's employment followed other, related "discipline," any argument that the termination constituted "progressive discipline" must be rejected because the prior "discipline" upon which it would be based is itself unlawful. "It is well settled that where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful discipline." *Metro One*, 356 NLRB No. 20, slip op. 17 (November 8, 2010), *quoting Publix Super Markets*, 347 NLRB 1434, 1441 (2006). Given Respondent's ongoing retaliation, Judge Carson correctly found that Respondent's bases for terminating Silva's employment were fatally flawed.

B. Judge Carson Properly Determined that Respondent's Discipline of Kelly Was Unlawful

Applying *Wright Line* to Respondent's discipline of Kelly, Judge Carson correctly concluded that Respondent's discipline of her was retaliatory. (D. 15:25-29). Less than two weeks after Kelly participated in the arbitration of her suspension-related grievance, Auble cobbled together stale, previously ignored "violations" of a vaguely defined "chain of command" policy, Kelly's absence from her desk to participate in the arbitration, and arguably technical violations of the attendance policy in order to discipline Kelly. At the hearing, Auble did not defend or explain his discipline of Kelly. Significantly, Auble did not directly address the "chain of command" policy that Kelly supposedly violated, nor did he either challenge Kelly's

description of Konopaski's "open door policy" or explain why incidents almost one (1) year old suddenly warranted discipline. Further, Auble did not rebut Kelly's testimony that she had already produced a doctor's note (and failed to explain why he felt it was unsatisfactory), or her testimony that Konopaski had given her permission to forego a doctor's note with regard to her daughter's illness. Thus, Judge Carson's conclusion is consistent with the record and existing precedent and should be affirmed.

C. Judge Carson Properly Found that Respondent Violated §8(a)(1) by Telling Silva That Her Protected Activities Were "Unprofessional"

Judge Carson correctly found Respondent liable for Early's anti-Union statements to Silva. (D. 10:21-31, 12:6-18). Respondent attempts (R. Br. 25) to artificially limit the scope of §8(a)(1) to encompass only "statement[s] or threat[s] that future union activity would be futile." The cases cited by Respondent do not support this novel limitation of the Act, which is clearly at odds with the plain language of the statute and contrary to decades of established precedent holding that statements and conduct violate §8(a)(1) if they reasonably tend to restrain, coerce, or interfere with employees free exercise of their §7 rights. Given the record evidence regarding the exchange between Early and Silva, Judge Carson correctly concluded that Early's statements criticizing Silva were unlawful, and further evidence of Respondent's animus towards Silva's protected activities.

D. Judge Carson Correctly Determined that Respondent Unlawfully Implemented New Rules in January 2010

Judge Carson correctly found that Respondent violated §8(a)(5) when it unilaterally implemented new rules and, thereafter, steadfastly refused to bargain with the Union over the effects of any of the changes. Respondent admits that its "no loitering" policy, as well as large portions of the internet and e-mail policy, are new. (R. Br. 25-26). Respondent also acknowledges that it has refused to bargain over the changes or their effects. Respondent does not seriously defend the modifications, and only cites a "recommendation" from an unnamed Department of Labor representative (who did not testify) as authority for implementing an overly broad no-access rule. (R. Br. 26 – 27). Under such circumstances, Judge Carson's findings and conclusions must be affirmed.

E. Judge Carson Appropriately Found that Respondent Unlawfully Refused to Provide the Union with Relevant Requested Information

Judge Carson correctly concluded that Respondent unlawfully refused to provide the Union with relevant requested information, *i.e.*, Lucy Miyamoto's résumé (GC Ex. 41). Respondent argues that it withheld Miyamoto's résumé to protect her "personal information." Respondent's argument is without merit. Miyamoto's résumé only contained information regarding her previous work history; an employee's work history in the private sector is not *per se* "confidential," and Respondent pointed to no information contained in the résumé that might possess the "legitimate aura of confidentiality" that would privilege the Respondent to withhold it from the Union. *See, e.g., Exxon Co. USA*, 321 NLRB 896, 898-99 (1996).

Respondent also ignores the possibility that "confidential" information could have been redacted. *See, e.g., LaGuardia Hospital*, 260 NLRB 1455, 1455-56 (1982). Regardless, Respondent long ago had provided the Union with, arguably, Miyamoto's most "personal information:" her Social Security Number and home address. (GC Ex. 40). Moreover, Respondent did not offer any objection to the inclusion of Miyamoto's résumé in the record. (Tr. 310:18 - 311:6). Given such a blatantly unmeritorious argument, Judge Carson's findings and conclusion that Respondent violated §8(a)(5) should be affirmed.

IV. CONCLUSION

Counsel for Acting General Counsel respectfully submits that the evidence in the record and relevant case law fully support Judge Carson's finding, rulings, and conclusions that Respondent violated §§8(a)(1), (3), and (5) of the Act as set forth in the Decision.

DATED at Seattle, Washington, this 7th day of March, 2011.

Peter G. Finch
Counsel for Acting General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2011, I caused copies of Acting General Counsel's Answering Brief to Respondent's Exceptions and Brief in Support Thereof to be served upon each of the following parties by E-File, E Mail, and United States postage pre-paid mail:

E-File:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 - 14th Street N.W., Room 11602
Washington, D.C. 20570-0001
(202) 273-1067

E-Mail and U. S. Mail:

David Hannah, Attorney
12701 NE 9th Pl, Ste. D311
Bellevue, WA 98005
davidahannah@comcast.net
Phone: (425) 941-5997

Janet A. Irons, Attorney
Law Offices of Janet A. Irons
1400 - 112th Ave. SE, Suite 100
Bellevue, WA 98004
irons_law@hotmail.com
Phone: (206) 447-8500
Fax: (425) 668-1707

Rebekah Silva
16916 - 212th Ave NE
Woodinville, WA 98077
Phone: (206) 753-7039
rsilva1@hotmail.com

Tiffany Kelly
6916 - 126th Ave NE
Lake Stevens, WA 98258
Phone: (425) 322-3434
kaliemonster@yahoo.com

Mary L. Maloy, Union Representative
OPEIU Local 8
2800 First Avenue, Ste. 304
Seattle, WA 98121-1114
Phone: (206) 441-8880, Ext. 106
marym@opeiu8.org

E-Mail and U. S. Mail:

IUOE Local 302
Attn: Daren Konopaski, Business Manager
18701 - 120th Ave NE - Suite 101
Bothell, WA 98011-9514
dkonopaski@iuoe302.org

Kathlyn L. Mills, Secretary